Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

KELSEY-HAYES COMPANY,

Cross-Petitioner,

v.

JOSEPH GOLDEN, ANGELO DEITOS, EDWARD JONES, LUTHER PALMER, CAROLINE FORYS, JOSEPHINE THOMAS, ARTHUR SALLIS, THELMA SONGER, JOHN W. GALLOWAY and ROGER FARRAR, on behalf of themselves and a class of persons similarly situated,

Cross-Respondents.

On Conditional Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Do the Employee Retirement Income Security Act of 1974 ("ERISA"), and principles derived from it, apply to a welfare benefit plan established pursuant to collective bargaining agreements?

II. Does ERISA supersede inconsistent federal common law under the Labor Management Relations Act?

III. Can welfare benefits vest under an ERISA-regulated welfare benefit plan, whose terms do not provide for vesting of welfare benefits?

IV. Can the district court presume or "infer" that health benefits vest upon an employee's retirement, based on his status as a retiree, and substitute that inference for benefit plan language that does not provide for vesting of welfare benefits?

PARTIES BELOW

Kelsey-Hayes Company and Hayes Wheels International, Inc. were Defendants in the District Court, and Respondents to the petition for writ of mandamus in the Court of Appeals. Kelsey-Hayes Company was the Appellant in the Court of Appeals and is Cross-Petitioner here; Hayes Wheels International, Inc. is not. Kelsey-Hayes Company is a wholly-owned subsidiary of Varity Corporation, a publicly traded corporation, and is now known as "VarityKelsey-Hayes Company." Hayes Wheels International, Inc. is a publicly-traded corporation. It has agreed to merge with MWC Holdings, Inc., a publicly traded corporation. Neither Kelsey-Hayes nor Hayes Wheels has any non-wholly-owned subsidiary.

Cross-Respondents Joseph Golden, Angelo Deitos, Edward Jones, Luther Palmer, Caroline Forys, Josephine Thomas, Arthur Sallis, Thelma Songer, John W. Galloway and Roger Farrar were Plaintiffs in the District Court, and Appellees and Petitioners for a writ of mandamus in the Court of Appeals. Ida Thomason and John Hoyle were Plaintiffs in the District Court below, but are not parties in this Court; Thomason was dismissed and Hoyle is dead. Stephen Santangelo is a plaintiff in the District Court, but is not a party in this Court.

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KELSEY-HAYES COMPANY,

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CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

Kelsey-Hayes Company hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, filed on January 18, 1996, affirming a preliminary injunction against it in *Golden v. Kelsey-Hayes Co.*, 6th Cir. No. 94-1403, and denying a writ of mandamus in *In re Joseph Golden*, 6th Cir. No. 95-1474. This cross-petition is conditional: Cross-Petitioner requests it be granted only if the Court grants the petition in *Golden v. Kelsey-Hayes Co.*, No. 95-1674.

OPINIONS BELOW

The Court of Appeal's opinion is reported at 73 F.3d 648 (6th Cir. 1996), and is reproduced at pages 1a-34a of the Appendix to the certiorari petition (hereafter "Pet. App."). The Order denying hearing *en banc*, entered February 1, 1996, is unpublished and is reproduced at page 1a of the Appendix to this Cross-Petition (hereinafter "C-Pet. App."). The District Court Order granting the Plaintiffs' motion for preliminary injunction is reported at 845 F. Supp. 410 (E.D. Mich. 1994). (Pet. App. 53a-66a)

JURISDICTIONAL STATEMENT

The Court of Appeals possessed jurisdiction pursuant to 28 U.S.C. § 1292(a)(1). The Court entered its opinion on January 18, 1996, and no petition for panel rehearing was filed. (Pet App. 1a) The first petition for writ of certiorari was filed in this Court on April 17, 1996. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1); Cross-Petitioner here relies on Supreme Court Rule 12.5. Although the Court of Appeals issued its mandate in the injunction appeal on February 9, 1996, this Court may consider the issues here raised. *Aetna Casualty & Surety Co. v. Flowers*, 330 U.S. 464, 467 (1947).

STATUTORY PROVISIONS INVOLVED

Section 301(a) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), provides:

> **§ 185. Suits by and against labor organizations**
>
> **(a) Venue, amount, and citizenship**
>
> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this

chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 4(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1003(a), provides:

> Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained—
>
> (1) by any employer engaged in commerce or in any industry or activity affecting commerce; or
>
> (2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or
>
> (3) by both.

Section 514 of ERISA, 29 U.S.C. § 1144, provides in relevant part:

> **§ 1144. Other Laws**
>
> **(a) Supersedure; effective date**
>
> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.
>
> * * *
>
> **(c) Definitions**
>
> For purposes of this section:
>
> (1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United

States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

* * *

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of the United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(c) of this title) or any rule or regulation issued under any such law.

STATEMENT OF THE CASE

Plaintiff UAW retirees and surviving spouses below sought an injunction requiring Kelsey-Hayes to provide comprehensive health benefits coverage at no cost to them for the rest of their lives. The suit was triggered by announced modifications (not termination) of their health benefits to include premium contributions; increased copayments and annual deductibles; changes in the manner coverage was coordinated with Medicare; and a lifetime benefit cap of $500,000 per beneficiary. Plaintiffs' Complaint articulated three theories. Count I alleged violations of expired collective bargaining agreements ("CBAs") between Kelsey-Hayes and the UAW and UAW Locals at both current and sold facilities, pursuant to Section 301(a) of the LMRA. Count II sought to recover benefits and to clarify rights, pursuant to Section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B); and Count III alleged estoppel. (R.1: Complaint 7-13)

Plaintiffs filed the Complaint on November 12, 1993 (R.1), and a Motion for Preliminary Injunction on December 23, 1993 (R.4).[1] Due to agreements reached at the Detroit and Romulus facilities, Plaintiffs sought a preliminary injunction only as to the facilities sold in 1987: Heintz, SPECO and Gunite.

The Heintz and SPECO CBAs possessed a structure similar to that covering Detroit and Romulus: the CBA provided that there will be an insurance program, to be set out in a separate insurance agreement, which is then incorporated by reference. The "Insurance Supplemental Agreement" consisted of a short insurance agreement, which in turn incorporates an insurance program which spells out the benefits provided, eligibility criteria, and the details of the program. (R.5: Thomas Aff't; R.6: Hess Aff't Exs. D-H) The insurance programs contain similar (not identical) provisions. Both the Insurance Supplemental Agreements at Heintz and at SPECO provided in a "duration of agreement" clause that: "This Agreement and Program as modified and supplemented by this Agreement shall continue in effect until the termination of the Collective Bargaining Agreement of which this is a part." (C-Pet. App. 3a, 7a)

At Gunite there was no insurance supplement; the benefits and eligibility criteria were spelled out in the CBA itself, in different and simpler language than at Heintz and SPECO. The Gunite CBA, like the CBAs at Heintz and SPECO, did contain a provision entitled "Duration",

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[1] In support of the motion, Plaintiffs submitted: the last collective bargaining agreement for each plant, the last applicable insurance supplement for Heintz and SPECO (there was no insurance supplement at Gunite), a 1984 summary plan description for Gunite, and a 1977 summary plan description for Heintz. (R.6)

which defined the fixed term of the Agreement and the date upon which it terminated. (C-Pet. App. 3a, 6a, 10a)

Nothing in any of the CBAs or Insurance Supplemental Agreements provided for vesting or lifetime duration or continuation of health benefits beyond the term of the contract. The Insurance Supplemental Agreements only provided that the same health care coverage an active employee has at retirement "shall be continued" (SPECO) or "shall be continued thereafter" (Heintz). (R.6: Hess Aff't Exs. F at 87, H at 43) The Gunite CBA contains even less: *no* continuation or eligibility provision—just that "The Company will pay the full cost" of medical coverage of current and future pensioners. There is no provision anywhere for vesting, or for continuation of benefits beyond contract expiration. Each CBA contained an integration or "zipper" clause, terminating all prior agreements and providing that the CBA (and Insurance Supplemental Agreements) comprised the entire agreement between the parties. (R.6: Hess Aff't Ex. A at 67, Ex. D at 59, Ex. G at 69)

The district court issued its decision granting a preliminary injunction on March 14, 1994. (Pet. App. 53a) As clarified, the order required Kelsey-Hayes to reinstate health care benefits for all hourly retirees who retired from the Heintz, SPECO and Gunite plants, and their surviving spouses and dependents, at the levels in effect when Kelsey-Hayes sold the plants in 1987. (R.19: Op. 16; R.27: Op. 3)

The district court defined the issue as whether the health benefits provided in the CBAs had vested for the lifetime of the retirees, so as to preclude unilateral modification. The court concluded that Plaintiffs had demonstrated a "strong likelihood of success on the merits of

their claim for lifetime retiree health care benefits" (Pet. App. 62a), in reliance on *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984), and its progeny. The court noted that "[t]he most important holding of the *Yard-Man* decision is a recognition of an inference of interminable [retiree insurance] benefits absent express language to the contrary" in the CBA. (Pet. App. 57a) The court held the *Yard-Man* "inference" outweighed both the durational clauses in the CBAs, and the specific duration clauses in the Insurance Supplemental Agreements. (Pet. App. 60-61a) Apart from the *Yard-Man* "inference" and that the CBAs tied eligibility for health benefits to the status of being pension-eligible, the only other evidence relied upon by the court was entirely extrinsic to the CBAs—summary plan descriptions ("SPDs"). (C-Pet. App. 11a-12a) (Pet. App. 62)

Kelsey Hayes filed a timely notice of appeal to the Sixth Circuit, which affirmed the injunction. (R.24) The Court rejected Kelsey-Hayes' argument that the *Yard-Man* "inference", by interpolating vesting language into silent welfare benefit plan documents (the CBAs), was inconsistent with ERISA and this Court's post-*Yard-Man* jurisprudence. The Sixth Circuit expressly reaffirmed both the validity of *Yard-Man*, and the substantial likelihood of success finding. Although the Court stated that *Yard-Man* "does not shift the burden of proof to the employer, nor does it require specific anti-vesting language before a court can find the parties did not intend benefits to vest", it upheld vesting when the CBA's were silent. Although the Court stated that *Yard-Man* creates "no legal presumption based on the status of retired employees", it upheld the lower court's reasoning that vesting was evidenced by the CBAs' linkage of welfare benefit eligibility to pensioner status. (Pet. App. 12a)

REASONS FOR GRANTING THE WRIT

Employers are normally free to modify ERISA-regulated welfare benefit plans at will. When collective bargaining agreements expire, they expire. But since 1983, the Sixth Circuit has drawn an "inference" or presumption in cases involving health benefits provided to union retirees: that health benefits vest upon retirement, without regard to the terms of the benefit plan.

The Court of Appeals erred when it:

- held that ERISA principles do not apply to this case, an action to recover benefits under the terms of an ERISA-regulated welfare benefit plan;
- disregarded controlling Supreme Court precedent in favor of a contrary "inference" derived from its decision in *Yard-Man*; and
- "inferred" that health benefits vest on retirement, based solely on the plaintiffs' "status" as retirees, and not on any term of the benefit plan documents.

I.

THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRIOR PRONOUNCEMENTS.

a. This is an action to recover benefits allegedly due under the terms of a welfare benefit plan, and to clarify rights to future benefits under the terms of the plan, brought under § 502(a)(1)(B) of ERISA and § 301(a) of the L.M.R.A. (R.1, Complaint ¶¶ 1-2)

ERISA must control this case, as it controls every action to recover welfare benefits. The Sixth Circuit failed to follow the statute, and prior pronouncements of this Court. It committed several errors of law when it expressly refused to apply ERISA principles, applied an "inference" that health benefits vest on retirement unless the

employer proves otherwise, and allowed that "inference" to interpolate a vesting provision that does not actually appear in the benefit plan documents. That "inference," and the decisions below, conflict with prior decisions of this Court and of other United States Courts of Appeals.

b. This Court recently, and unanimously, pronounced the rule that should have controlled this case:

> . . . ERISA does not create any substantive entitlement to employer-provided health benefits or any other kind of welfare benefits. Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans. See *Adams v. Avondale Industries, Inc.*, 905 F.2d 943, 947 (CA6 1990) ("[A] company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan"). Nor does ERISA establish any minimum participation, vesting, or funding requirements for welfare plans as it does for pension plans. See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90-91, 103 S. Ct. 2890, 2896-2897, 77 L.Ed.2d. 490 (1983). Accordingly, that Curtiss-Wright amended its plan to deprive respondents of health benefits is not a cognizable complaint under ERISA; the only cognizable claim is that the company did not do so in a permissible manner.

Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. 1223, 1228 (1995).

Like this case, *Curtiss-Wright* involved a modification of retiree health benefits.[2] The Third Circuit had held that *Curtiss-Wright* unquestionably had the right to modify its

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[2] ERISA divides benefits plans into two classes: pension benefit plans and welfare benefit plans, which include the health benefit plan at issue in this case. ERISA § 3(1), (2), 29 U.S.C. § 1002(1), (2).

welfare plan, but that the amendment procedure was not stated specifically enough. *Schoonejongen v. Curtiss-Wright Corp.*, 18 F.3d 1034 (3d Cir. 1994), *rev'd*, 115 S. Ct. 1223 (1995). This Court agreed with the first holding, but reversed the second. 115 S. Ct. at 1228-29. The presumed right to amend a welfare benefit plan is *statutory*, not a term of a particular plan, and need not be explicitly reserved in the plan documents. *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 855 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1442 (1995); *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 937 (5th Cir.), *cert. denied*, 114 S. Ct. 196 (1993); *Deibler v. UFCW Local 23*, 973 F.2d 206, 210 (3d Cir. 1992) (severance pay).

In this case, and in several earlier decisions, the United States Court of Appeals for the Sixth Circuit has applied an "inference" directly contrary to the presumption this Court recognized in *Curtiss-Wright*: an "inference" that health benefits of union-represented employees vest upon retirement, regardless what the terms of the collective bargaining agreement actually provide. That Court first described the "inference" as follows:

> Finally, examination of the context in which these benefits arose demonstrates the likelihood that continuing insurance benefits for retirees were intended. Benefits for retirees are only permissive not mandatory subjects of collective bargaining. *Pittsburgh Plate Glass Co., supra*, 404 U.S. at 181-82, 92 S.Ct. at 398-99. As such, it is unlikely that such benefits, which are typically understood as a form of delayed compensation or reward for past services, would be left to the contingencies of future negotiations. *See, e.g., Cadillac Malleable Iron supra*, slip op. at 12-13; *Cantor v. Berkshire Life Ins. Co.*, 171 Ohio 405, 171 N.E.2d 518 (1960); *Roxbury Carpet, supra*, 73-2 Lab. Arb. Awards ¶ 8521, p. 4940. The employees are presumably aware that the union owes no obligation

> to bargain for continued benefits for retirees. If they forego wages now in expectation of retiree benefits, they would want assurance that once they retire they will continue to receive such benefits regardless of the bargain reached in subsequent agreements. Contrary to Yard-Man's assertions, the finding of an intent to create interminable rights to retiree insurance benefits in the absence of explicit language, is not, in any discernible way, inconsistent with federal labor law.
>
> Further, retiree benefits are in a sense "status" benefits which, as such, carry with them an inference that they continue so long as the prerequisite status is maintained. Thus, when the parties contract for benefits which accrue upon achievement of retiree status, there is an inference that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree. This is not to say that retiree insurance benefits are necessarily interminable by their nature. Nor does any federal labor policy identified to this Court presumptively favor the finding of interminable rights to retiree insurance benefits when the collective bargaining agreement is silent. Rather, as part of the context from which the collective bargaining agreement arose, the nature of such benefits simply provides another inference of intent. Standing alone, this factor would be insufficient to find an intent to create interminable benefits. In the present case, however, this contextual factor buttresses the already sufficient evidence of such intent in the language of this agreement itself.

UAW v. Yard-Man, Inc., 716 F.2d at 1482. That "inference" has often been abused in the Sixth Circuit to justify a finding of vested benefits that has no support in the text of plan documents, as occurred in this case.

c. The Court of Appeals justified its departure from *Curtiss-Wright* and other ERISA principles by observing

that this case involves collective bargaining and the LMRA, and *Curtiss-Wright* did not. (Pet. App. 10a).

But ERISA does apply to collectively-bargained benefit plans. ERISA applies to every "employee benefit plan" established or maintained by (1) an "employer engaged in commerce or in any industry or activity affecting commerce," (2) a labor organization, or (3) "by both." ERISA § 4(a), 29 U.S.C. § 1003(a). ERISA defines the term "industry or activity affecting commerce" to "include[ ] any activity 'affecting commerce' within the meaning of the Labor Management Relations Act." ERISA § 3(12), 29 U.S.C. § 1002(12). By definition ERISA, its remedies and limitations, apply to a benefit plan established by collective bargaining, *i.e.*, "by both" under ERISA § 4(a)(3).

Nothing in ERISA, or in the LMRA, or in *Curtiss-Wright*, suggests that collectively-bargained welfare benefit plans are exempt from ERISA or from the *Curtiss-Wright* rule.

ERISA, a "comprehensive and reticulated" statute, regulates the entire field of employee benefits and employee benefit plans, and governs any claim of entitlement to benefits. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510, 523 (1981). As a general matter of statutory construction, specific statutes prevail over general, and new statutes prevail over old. ERISA (1974) is newer than the LMRA (1947) and ERISA is far more specific. To the extent that they conflict, ERISA must prevail over a more general labor-relations statute such as the LMRA. *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 375-76 (1990) (ERISA's specific anti-alienation provision, § 206(d)(1), 29 U.S.C. § 1056(d)(1), controls over general remedial provision in § 501(b) of Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 501(b));

Pension Benefit Guar. Corp. v. Alloytek, Inc., 924 F.2d 620, 626 (6th Cir. 1991) (specific provision of ERISA prevails over general procedural provision of Fed. R. Civ. P. 13(a)).

Of course, here there is no conflict between ERISA and LMRA. LMRA § 301(a) may provide jurisdiction, but jurisdiction is all it provides. The LMRA does not prescribe standards for the regulation and interpretation of benefit plans. ERISA does. The LMRA does not prescribe remedies for the enforcement of benefit plans. ERISA spells out the remedies available in exacting, "comprehensive and reticulated" detail, to the exclusion of any remedy not listed. ERISA § 502(a), 29 U.S.C. § 1132(a); *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 113 S. Ct. 2063, 2066 (1993).

The conflict rather is between ERISA and its federalized law of trusts, and the "common law" derived from *Yard-Man*. Plaintiffs have argued below that ERISA § 514(d), 29 U.S.C. § 1144(d), saves LMRA common law (the *Yard-Man* inference) from being displaced by ERISA. But that argument is wrong both as a matter of statutory construction, and as a matter of precedent. First, ERISA preempts all State law, and defines "State law"—but not "law"—to include judicial "decisions . . . having the effect of law, of any State," *i.e.*, common law. ERISA § 514(a), (c)(1), 29 U.S.C. § 1144(a), (c)(1). ERISA saves from preemption "any law of the United States . . . or any rule or regulation issued under any such law." ERISA § 514(d). The word "decision" is conspicuously absent. Thus, by its express terms, ERISA § 514(d) saves only previously-existing federal legislation from its preemptive embrace. *Bonin v. American Airlines, Inc.*, 621 F.2d 635, 638 (5th Cir. 1980). It does *not* preserve inconsistent federal common law.

Second, ERISA was enacted and took effect on September 2, 1974. It didn't go to sleep for 20 years, like Rip Van Winkle, only to wake up in 1994 and try to unlace 20 years of common law. ERISA came before *Yard-Man*, before the Sixth Circuit developed this "common law" on modification of retiree health benefits. ERISA must be a cornerstone of the federal common law under LMRA § 301, in cases involving collectively-bargained welfare plans, and courts must recognize its provisions and policies in fashioning that common law. *UAW v. Park Ohio Indus.*, 687 F. Supp. 338, 341 (N.D. Ohio 1987), *aff'd in part, rev'd in part*, 876 F.2d 894 (6th Cir. 1989). ERISA and the principles of trust law federalized by ERISA apply, under ERISA, to benefit plans that are the product of collective bargaining. *Central States, Southeast and Southwest Areas Pension Fund v. Central Trans., Inc.*, 472 U.S. 559, 570 (1985) (involved both pension and welfare plans); *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983); *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-34 (1981).

The Sixth Circuit's own case law illustrates the anomalous nature of the *Yard-Man* "inference". In cases that involve retiree health benefits but not collective bargaining, the Sixth Circuit has applied the *Curtiss-Wright* rule that an employer normally can modify a welfare benefit plan. *Boyer v. Douglas Components Corp.*, 986 F.2d 999 (6th Cir. 1993); *Gordon v. Barnes Pumps, Inc.*, 999 F.2d 133 (6th Cir. 1993); *Gill v. Moco Thermal Indus., Inc.*, 981 F.2d 858 (6th Cir. 1992); *Adams*, 905 F.2d at 947 (*cited by Curtiss-Wright*, 115 S. Ct. at 1228); *Musto v. American Gen. Corp.*, 861 F.2d 897 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989).

Further, in cases that involve collective bargaining agreements but not retiree health benefits, the Sixth Circuit

frequently applies ERISA principles to the interpretation of those CBAs. *United Steelworkers of Am. v. United Engineering, Inc.*, 52 F.3d 1386, 1395-96 (6th Cir. 1995); *Adcox v. Teledyne, Inc.*, 21 F.3d 1381, 1389 (6th Cir.), *cert. denied*, 115 S. Ct. 193 (1994) (analyzes whether welfare benefit "vested" under CBA by reference to ERISA, and to cases applying ERISA to non-union retirees and employees); *United Steelworkers of Am., Local 2116 v. Cyclops Corp.*, 860 F.2d 189, 196-97 (6th Cir. 1988) (LMRA § 301 and ERISA provide concurrent jurisdiction to enforce benefit plans; analyzes substantive obligations under ERISA); *Central States Southeast and Southwest Areas Pension Fund v. Central Trans. Inc.*, 698 F.2d 802, 809-813 (6th Cir. 1983) (CBAs interpreted in light of ERISA), *rev'd other grounds*, 472 U.S. 559 (1985) (Supreme Court agreed with this principle, 472 U.S. at 570); *United Steelworkers of Am. v. North Bend Terminal Co.*, 752 F.2d 256 (6th Cir. 1985) (brought under both LMRA § 301 and ERISA § 502; employer's obligations analyzed under ERISA).

d. In this case, the Sixth Circuit held expressly that welfare benefits can vest upon retirement, even if the plan document does not provide for vesting under any circumstances. (Pet. App. 11a) That is a necessary consequence of the *Yard-Man* "inference." But that holding conflicts with this Court's pronouncements in *Curtiss-Wright* and other cases.

ERISA's statute of frauds, ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), requires that:

> Every employee benefit plan shall be established and maintained pursuant to a written instrument.

This statute of frauds applies to welfare plans, and is a "core functional requirement" of ERISA. *Curtiss-Wright*, 115 S. Ct. at 1230. A "written plan is to be required in order

that every employee may, *on examining the plan documents*, determine exactly what his rights and obligations are under the plan." *Curtiss-Wright*, 115 S.Ct. at 1230, (*quoting with emphasis added*, H.R. Rep. No. 93-1280, p. 297, *reprinted in* 1974 U.S. Code Cong. & Admin.News pp. 4639, 5077, 5078). A CBA or benefit plan may provide vested rights that survive termination of the employment relationship or contract. *But*, any such agreement must be included in the written terms of the contract or benefit plan. *Ryan v. Chromalloy Am. Corp.*, 877 F.2d 598, 602 (7th Cir. 1989). The written terms of a benefit plan document may not be modified or superseded by oral statements, or informal written communications such as letters. *Musto*, 861 F.2d at 910.

e. The Sixth Circuit's application of *Yard-Man* further conflicts with this Court's decision in *Litton Fin. Printing Div'n v. NLRB*, 501 U.S. 190 (1991), which rejects the notion that an obligation to continue a benefit plan or other entitlement "normally" survives CBA expiration.

The interpretation and enforcement of collective bargaining agreements is governed by substantive federal law. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957). In fashioning federal common law under the LMRA, the courts should apply traditional principles of contract law that are consistent with federal labor policy. *Id.* at 457; *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 548 (1964). At common law, when a contract does not include an express durational provision, it is construed as terminable at will, not as continuing forever. *Murphy v. Keystone Wire & Steel Co.*, 61 F.3d 560, 567 (7th Cir. 1995) (federal common law applied to benefit plan); *All Line, Inc. v. Rabar Corp.*, 919 F.2d 475, 479 (7th Cir. 1990) (contract under Illinois law); *First Commodity Traders, Inc. v. Heinold Commodities, Inc.*, 766

F.2d 1007, 1012 (7th Cir. 1985) (Illinois law); *Moorehouse v. Boeing Co.*, 501 F. Supp. 390, 395 (E.D. Pa.), *aff'd mem.*, 639 F.2d 774 (3d Cir. 1980) (Pennsylvania law); *Miller v. Wikel Mfg. Co.*, 545 N.E.2d 76, 79 (Ohio 1989).

And the common-law rule applies to collective bargaining agreements too. A CBA with no fixed expiration date is terminable at will, rather than *in*terminable. National Labor Relations Act § 8(d)(1), 29 U.S.C. § 158(d)(1); *Montgomery Mailers' Union No. 127 v. Advertiser Co.*, 827 F.2d 709, 715 (11th Cir. 1987); *Communications Workers v. Southwestern Bell Tel. Co.*, 713 F.2d 1118, 1123 n.4 (5th Cir. 1983); *In re United Mine Workers of Am. Employer Benefit Plans Litigation*, 782 F. Supp. 658, 669 (D. D.C. 1992), *aff'd sub nom., United Mine Workers v. Pittston Co.*, 984 F.2d 469 (D.C. Cir), *cert. denied*, 113 S. Ct. 3039 (1993); *Boeing Airplane Co. v. NLRB*, 174 F.2d 988, 991 (D.C. Cir. 1949); *Trustees of Atlanta Iron Workers Local 387 Pension Fund v. Southern Stress Wire Corp.*, 509 F. Supp. 1097, 1105 n.12 (N.D. Ga. 1981); *Eastern Dist. Council of United Bhd. of Carpenters v. Blake Const. Co.*, 457 F. Supp. 825, 830 (E.D. Va. 1978).[3]

At common law, a contract is not construed as providing a perpetual right unless the contract clearly states that is the intent of the parties. *William B. Tanner Co. v. Sparta-Tomah Broadcasting Co.*, 716 F.2d 1155, 1159 (7th

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[3] *Accord New York News Inc. v. Newspaper Guild*, 927 F.2d 82, 84 (2d Cir. 1991) (contract that continues to fixed expiration date, then indefinitely thereafter, may be terminated at will, and 15 days' notice is reasonable); *United Trans. Union v. Grand Trunk Western R. Co.*, 712 F. Supp. 107, 109 (E.D. Mich. 1989) (Zatkoff, J.) (contract under Railway Labor Act has no fixed expiration date and notice of modification may be given at any time), *aff'd*, 901 F.2d 489 (6th Cir.), *cert. denied*, 498 U.S. 815 (1990). This is also the rule at common law.

Cir. 1983) (Wisconsin law); *Town of Readsboro v. Hoosac Tunnel & W. R. Co.*, 6 F.2d 733, 735 (2d Cir. 1925) (Learned Hand, J.) (pre-*Erie* case arising in Vermont, applying national common law, relying on Massachusetts and Sixth Circuit precedents); *United States Surgical Corp. v. Oregon Medical & Surgical Specialties, Inc.*, 497 F. Supp. 68, 71 (S.D.N.Y. 1980) (New York law); *Warner-Lambert Pharmaceutical Co. v. John J. Reynolds, Inc.*, 178 F. Supp. 655, 661 & n.5 (S.D.N.Y. 1959), *aff'd*, 280 F.2d 197 (2d Cir. 1960) (New York and Missouri law follow same rule); *Shannon v. Civil Service Empl. Ins. Union*, 337 P.2d 136, 138 (Cal. App. 1959).

In *Litton*, this Court applied the common law rule—no perpetual obligation unless the contract expressly says so. The Court held that:

> As with the obligation to make pension contributions in *Advanced Lightweight Concrete Co.*, other contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement. Exceptions are determined by contract interpretation. Rights which accrued or vested under the agreement will, as a general rule, survive termination of the agreement. And, of course, if a collective bargaining agreement provides *in explicit terms that* certain *benefits continue after the agreement's expiration*, disputes as to such continuing benefits may be found to arise under the agreement, and so become subject to the contract's arbitration provisions.

501 U.S. at 207-08 (emphasis added).

f. The injunction covers only retirees and surviving spouses from the Heintz, SPECO, and Gunite plants, which CBAs all expired by 1990. The district courts therefore have no jurisdiction under LMRA § 301 to entertain suits to enforce those agreements. *Litton*, 501 U.S. at 206. Once

again the application of the *Yard-Man* "inference," or any LMRA concept contrary to ERISA, conflicts with *Litton*.[4]

First, the Insurance Supplemental Agreements were for a fixed term. The benefits it provided expired with it. *Litton*, 501 U.S. at 206-07; *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 606-07, 617 (7th Cir.) (*en banc*), *cert. denied*, 114 S. Ct. 291 (1993); *Yard-Man*, 716 F.2d at 1481 n.6; *Upholsterers' Int'l Union, Local No. 307 v. American Pad*, 372 F.2d 427, 428 & n.3 (6th Cir. 1967). The termination provision in this case is both specific to health benefits, and explicit: the agreement "terminates." Second, there was no provision for vesting or lifetime duration. Nothing in the Insurance Supplemental Agreements provided that health coverage would be provided for the lifetime of the retiree or extend beyond the expiration of the agreement, or that health benefits vested upon retirement, or that a retiree would become eligible for a particular health benefit upon retirement.

The Sixth Circuit's decision also conflicts with *Laborers Health & Welfare Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 548-49 (1988). This Court there held that the contractual obligation to make contributions to a multi-employer welfare benefit plan expired with the collective agreement, so the district court lacked subject matter jurisdiction under either LMRA or ERISA to enforce the expired agreement. That case is on point: the

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[4] In *Allied Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 n.20 (1971), this Court stated that a retiree would have standing under LMRA § 301 to sue to enforce a right vested under a collective bargaining agreement. But now that Congress has directly provided a cause of action under ERISA § 502(a)(1)(B), with specified procedures and remedies, the implied cause of action under LMRA § 301 "disappears." *United Engineering*, 52 F.3d at 1394.

obligation Plaintiffs are trying to impose on Kelsey-Hayes, and one of the primary contract provisions upon which they rely, is Article I, Section 3 of the Insurance Supplemental Agreements, which required the Company to "*contribute* the full premium or subscription change for Health Care" for retirees. (C-Pet. App. 3a, 4a, 7a)

g. The Sixth Circuit's errors are not isolated to this case, but have been serious and sustained since *Yard-Man* was decided. In some decisions, the Sixth Circuit flatly has stated that retiree benefits "normally" or presumptively vest. *Weimer v. Kurz-Kasch, Inc.*, 773 F.2d 669, 692 (6th Cir. 1985); *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609, 616-17 (6th Cir. 1985), *cert. denied*, 475 U.S. 1017 (1986). In others, the Court purports to hold that retiree status gives rise to no presumption, but still affirms a decision in which the lower court explicitly had applied a presumption and placed the burden of proof improperly upon the employer to disprove vesting. *UAW v. Cadillac Malleable Iron Co.*, 113 L.R.R.M. (BNA) 2525 (W.D. Mi. 1982), *aff'd*, 728 F.2d 807 (6th Cir. 1984). No matter how the Court parses the *Yard-Man* standard, the long history of decisions is one of *Yard-Man* cited, vesting of benefits found, and judgment entered in favor of union retirees. *Smith v. ABS Indus., Inc.*, 890 F.2d 841 (6th Cir. 1989); *Policy*, 770 F.2d 609; *Weimer*, 773 F.2d 669.

In the Sixth Circuit, a panel decision has *stare decisis* effect, and must be followed until it is overruled by the Court sitting *en banc* or by a decision of the Supreme Court. *Salmi v. Secretary of Health and Human Serv.*, 774 F.2d 685, 689 (6th Cir. 1985). In this case, the Sixth Circuit has both (1) denied a suggestion for hearing *en banc*, in order to consider over-ruling *Yard-Man*; and (2) held in the panel decision that *Curtiss-Wright*, *Litton*, and *Ad-*

vanced Lightweight Concrete have not overruled *Yard-Man*. (Pet. App. 10a-12a)

The Sixth Circuit plans to persist in this error. Only this Court can correct it.

II.

THE DECISION IN THIS CASE CONFLICTS WITH DECISIONS OF AT LEAST THE FIFTH, SEVENTH AND EIGHTH CIRCUITS.

a. No other Circuit Court has adopted the *Yard-Man* "inference". All put the burden of proof on retirees, and require express textual evidence of an intent to vest benefits.[5]

Three Circuits have rejected the *Yard-Man* "inference" by name, in critical language: the Fifth, Seventh and Eighth. *United Paperworkers v. Champion Int'l Corp.*, 908 F.2d 1252, 1261 n.12 (5th Cir. 1990) (expressly rejecting *Yard-Man* approach); *Bidlack*, 993 F.2d at 606-608;[6] *John Morrell & Co. v. UFCW*, 37 F.3d 1302, 1304 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 2251 (1995); *Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512, 1517 (8th

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[5] The other Circuits also apply ERISA in union-retiree cases. *John Morrell*, 37 F.3d at 1304; *Gable*, 35 F.3d at 855; *Williams v. Caterpillar, Inc.*, 944 F.2d 658, 661-62 (9th Cir. 1991).

[6] *Bidlack* was decided *en banc*, with the court split 3-3-4. Judge Posner's lead opinion and the plurality dissent state the law of that Circuit where those two opinions agree—including on vesting. *Central States, Southeast and Southwest Areas Pension Fund v. Joe McClelland, Inc.*, 23 F.3d 1256, 1259 (7th Cir. 1994); *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1187 (7th Cir. 1994). In *Bidlack* those two opinions, to which a majority of the court subscribed, adopted a rebuttable no-vesting default rule. 993 F.2d at 606-08, 619.

Cir. 1988), *cert. denied*, 489 U.S. 1051 (1989) (expressly rejecting *Yard-Man* "inference").

The Third, Fourth, and Ninth Circuits have largely ignored it, and put the burden of proof on the plaintiff to prove a vested right based on plan language. *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325, 330-31 (3d Cir. 1984); *Gable*, 35 F.3d at 855; *Williams*, 944 F.2d at 666-67.

Although several Circuits have cited *Yard-Man* for the uncontroversial principle that courts apply contract principles in construing labor agreements, that does not signal agreement with the "inference." The First and Ninth Circuits, in the mid-1980s, cited *Yard-Man* in preliminary injunction appeals. *United Steelworkers of Am. v. Textron, Inc.*, 836 F.2d 6 (1st Cir. 1987); *Bower v. Bank Hill, Co.*, 725 F.2d 1221, 1223 (9th Cir. 1984). The First Circuit never came back to this issue, but the Ninth Circuit has adopted the better view: no inference. *Williams*, 944 F.2d at 666-67. The Fourth and Eleventh Circuits, reviewing the same labor contract, applied *Yard-Man's* specific holding—that specific durational language controls over general—but did not adopt the "inference" then or later. *Keffer v. K.H. Porter Co.*, 872 F.2d 60, 62 (4th Cir. 1989); *United Steelworkers of Am. v. Connors Steel Co.*, 855 F.2d 1499, 1504-05 (11th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989).

Unless this Court accepts this Cross-Petition, *Yard-Man* will continue to engender confusion, not only in lower courts of the Sixth Circuit, but in district courts of circuits that have not specifically rejected the inference. *Webb v. GAF Corp.*, 1996 U.S. Dist. LEXIS 855 *14-18 (Jan. 24, 1996), *appeal dismissed*, 78 F.3d 53 (2d Cir. 1996); *United Steelworkers of Am. v. Newman-Crosby Steel, Inc.*, 822 F. Supp. 862, 867 (D. R.I. 1993). That confusion will result in the

improper entry of preliminary and then permanent injunctions against employers.

CONCLUSION

Cross-Petitioner KELSEY-HAYES COMPANY respectfully prays this Court to GRANT the Cross-Petition for a Writ of Certiorari, if it grants the Petition in No. 95-1674.

Respectfully submitted,

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Dated: May 17, 1996

APPENDIX A

No. 94-1463
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOSEPH GOLDEN, ET AL.,	)	
	)	
Plaintiffs-Appellees,	)	
	)	
	)	
v.	)	ORDER
	)	
	)	
KELSEY-HAYES COMPANY,	)	
	)	
Defendant-Appellant.	)	

The court having received a petition for hearing en banc, and the petition having been circulated to all active judges of this court, and no judge of this court having favored the suggestion,

It is ORDERED that the petition be and hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/

Leonard Green, Clerk

[Dated February 1, 1996]

APPENDIX B

SPECO COLLECTIVE BARGAINING AGREEMENT AND INSURANCE SUPPLEMENT.

The last CBA at SPECO expired April 13, 1989. It provided:

ARTICLE XX

INSURANCE PROGRAM

Section 126. The parties have provided for an amended Insurance Plan by Supplemental Agreement.

The Amended Plan will provide for Life Insurance Benefits for all employees covered by this Agreement, Accidental Death and Dismemberment Insurance, Sickness and Accident Weekly Benefits, Extended Disability Benefits, Hospital, Medical, Surgical, Hearing, Vision, Dental and Prescription Drug Expense Benefits, and Transition and Bridge Benefits.

The Company will assume full cost for the Insurance Program.

ARTICLE XXI

GENERAL PROVISIONS

* * *

Section 140. All prior agreements either oral or written are hereby cancelled and this Agreement and the supplements attached hereto shall constitute the entire Agreement between the parties. All grievances settled during the term of previous agreements either oral or written shall be final in respect to such specific grievance. It is also agreed that any plant wide privileges previously enjoyed by employees and not covered by this contract will not be denied them because of signing this Agreement.

* * *

ARTICLE XXII
TERMINATION OF AGREEMENT

Section 145. This Agreement dated April 11, 1986 shall continue in full force and effect without change through 11:59 p.m. Thursday, April 13, 1989.

(R.6: Hess Aff't Ex. G at 65-66, 69, 70)

The Insurance Supplement to that last CBA provided:

INSURANCE SUPPLEMENT F

Section 1. Establishing of Program

The Company will establish an amended insurance program, hereinafter referred to as the "Program," a copy of which is attached hereto as Supplement F-1 and made a part of this Agreement to the extent applicable to the employees represented by the Union and covered by this Agreement as is fully set out herein, modified and supplemented, however, by the provisions hereinafter.

* * *

Section 10. Duration of Agreement

This Agreement and Program, as modified and supplemented by this Agreement shall continue in effect until the termination of the Collective Bargaining Agreement of which this is a part.

* * *

INSURANCE PROGRAM SUPPLEMENT F-1

ARTICLE I
Effective Date, Financing and Administration of Insurance Program

* * *

Section 3. Company Contributions and Administration

* * *

(b) Company Contributions for Health Care Coverages

* * *

(6) For Retired Employees and Certain Former Employees

The Company shall contribute the full premium or subscription charge for Health Care (other than Dental or Vision) coverages continued in accordance with Article III, Section 5, for:

(i) A retired employee and his eligible dependents, if any, provided such retired employee is eligible for benefits under Article II of the Kelsey-Hayes Hourly-Rate Bargaining Unit Employees Pension Plan.

(ii) An employee and his eligible dependents, if any, terminating at age 65 or older for any reason other than a discharge for cause with insufficient credited service to entitle him to a benefit under Article II of the Kelsey-Hayes Hourly-Rate Bargaining Unit Employees Pension Plan.

(7) For Surviving Spouses

(i) The company shall contribute the full premium or subscription charge for Health Care (other than Dental or Vision) Coverages continued in accordance with Article III, Section 6 on behalf of a surviving spouse as defined in Article III, Section 6 and the eligible dependents of any such spouse, provided, however that the contributions on behalf of a surviving spouse for the month the surviving spouse becomes age 65 and subsequent months shall be made only for months that the surviving spouse has the voluntary coverage that is available under the Federal Social Security Act by making contributions.

* * *

ARTICLE III
HEALTH CARE BENEFITS

* * *

Section 5. Continuance of Health Care Coverage Upon Retirement or Termination of Employment at Age 65 or Older

(a) Health Care

Coverage (other than Dental and Vision) an employee has under this Article at the time of retirement or termination of employment at age 65 or older for any reason other than a discharge for cause with insufficient credited service to entitle the employee to a benefit under the SPECO Division of Kelsey-Hayes Company Pension Plan for Hourly-Rate Employees shall be continued by the Company.

* * *

Section 6. Continuance of Health Care Coverage for Surviving Spouse of an Employee or a Retired or Certain Former Employee

(a) The Company shall make suitable arrangements for a surviving spouse to participate in the Hospital and Medical Expense Prescription Drug and Hearing Aid (but not Dental and Vision) coverages, referred to in Article III as subject to the availability of the coverages:

* * *

(2) of a retired employee, (but not a former employee eligible for a deferred pension) if such spouse is receiving a benefit under a survivor benefit option under Article II, Section 6-f, of the SPECO Division of Kelsey-Hayes Company Pension Plan,

(3) of former employee whose employment was terminated at age 65 or older for any reason other than a discharge for cause with insufficient credited service to entitle the former employee to a benefit

under Article II of the SPECO Division of the Kelsey-Hayes Company Pension Plan,

* * *

(R.6: Hess Aff't Ex. H at F1, F6, F8, F10, F12, F43-F44)

HEINTZ COLLECTIVE BARGAINING AGREEMENTS AND INSURANCE SUPPLEMENT.

The last CBA at Heintz expired July 12, 1990. It provided:

ARTICLE XVI

PENSION PLAN, INSURANCE PROGRAM AND SUPPLEMENTAL UNEMPLOYMENT BENEFIT PLAN

The parties have provided for a Pension Plan, an Insurance Program, and a Supplemental Unemployment Benefit Plan by Supplemental Agreements signed by the parties simultaneously with the execution of this Agreement, which Supplemental Agreements are published under a separate cover as Supplementals "A," "B" and "C", respectively, and made part of this Agreement as if set out in full herein, subject to all provisions of this Agreement.

* * *

ARTICLE XVIII
TERMINATION

Section 1. This Agreement dated July 9, 1987, shall continue in full force and effect without change through 11:59 P.M., July 12, 1990. If either party desires to terminate this Agreement as provided above, or to modify this Agreement as hereinafter provided, the Agreement shall continue in effect from year to year after July 12, 1990 subject to termination by either party on sixty (60) days written notice prior to July 12 of any subsequent year.

(R.6: Hess Aff't Ex. D at 62, 64)

The Insurance Supplement to the Heintz 1980 CBA provided:

SUPPLEMENT "B"
SUPPLEMENTAL AGREEMENT
(Insurance Program)

Section 1. Establishment of Program

The Company will establish an amended insurance program, hereinafter referred to as the "Program," a copy of which is attached hereto as Supplement B-1 and made a part of this Agreement to the extent applicable to the employees represented by the Union and covered by this Agreement as if fully set out herein, modified and supplemented, however, by the provisions hereinafter.

* * *

Section 11. Duration of Agreement

This Agreement and Program as modified and supplemented by this Agreement shall continue in effect until the termination of the Collective Bargaining Agreement of which this is a part.

* * *

SUPPLEMENT "B-1"
THE KELSEY-HAYES INSURANCE PROGRAM
FOR HOURLY-RATE AND SALARIED
EMPLOYES WITHIN A BARGAINING UNIT

* * *

Section 3. Company Contributions and Administration

* * *

(a)(6) For Retired Employes and Certain Former Employees—The Company shall contribute the full premium or subscription charge for Health Care (including Vision effective August 1, 1981) Coverages continued in accordance with Article III, Section 5, for:

(i) A retired employe and his eligible dependents, if any, provided such retired employee is eligible for benefits under Article II of the Kelsey-Hayes Hourly-

Rate and Salaried Employees within a Bargaining Unit Pension Plan and

(ii) An employe and his eligible dependents, if any, terminating at age 65 or older for any reason other than a discharge for cause with insufficient credited service to entitle him to a benefit under Article II of the Kelsey-Hayes Hourly-Rate and Salaried Employees within a Bargaining Unit Pension Plan.

(a)(7) For Surviving Spouses

(i) The Company shall contribute the full premium or subscription charge for Health Care (including Vision effective August 1, 1981) Coverages continued in accordance with Article III, Section 6(b) on behalf of a surviving spouse as defined in Article III, Section 6(b), (1), (2), (3), and (4) (including for this purpose a surviving spouse who would receive survivor benefits under the Kelsey-Hayes Hourly-Rate and Salaried Employes within a Bargaining Unit Pension Plan except for receipt of survivor income benefits under Article II of this Program), and the eligible dependents of any such spouse, provided, however, that the contributions on behalf of a surviving spouse for the month the surviving spouse becomes age 65 and subsequent months shall be made only for months that the surviving spouse has the voluntary coverage that is available under the Federal Social Security Act by making contributions.

* * *

ARTICLE III
HEALTH CARE BENEFITS

* * *

Section 5. Continuance of Health Care (other than Vision) Coverages upon Retirement or Termination of Employment at Age 65 or Older

(a) The Health Care (other than Vision prior to September 1, 1981) Coverages an employe has under this Article at the time of retirement or termination of

employment at age 65 or older for any reason other than a discharge for cause with insufficient credited service to entitle him to a benefit under Article II of the Kelsey-Hayes Hourly-Rate and Salaried Employes within a Bargaining Unit Pension Plan shall be continued thereafter provided that suitable arrangements for such continuation can be made with the carrier(s). Contributions for such coverages so continued shall be in accordance with Article I, Section 3(b)(7).

(b) An employe who upon retirement is not enrolled for the coverages, as provided in subsection (a) above may enroll for Health Care (including Vision effective September 1, 1981) Coverages to which he is entitled at the time of or subsequent to retirement, subject to approval of the carrier(s). Such coverages shall become effective on the first of the month following receipt of application from such retired employe.

Section 6. Continuance of Health Care (other than Vision) Coverages for Surviving Spouse of an Employe or a Retired or Certain Former Employe

* * *

(b) The Company shall make suitable arrangements for a surviving spouse:

(1) of an employe or retired employe, (but not a former employe eligible for a deferred pension) if such spouse is receiving or is eligible to receive a survivor benefit under Article II of the Kelsey-Hayes, Heintz Division, Hourly-Rate Employes and Salaried Employes within a Bargaining Unit Pension Plan,

(2) of a retired employe if, prior to his death, he was receiving a benefit under Article II of the Kelsey-Hayes, Heintz Division Hourly-Rate Employes and Salaried Employes within a Bargaining Unit Pension Plan,

(3) of a former employe whose employment was terminated at age 65 or older for any reason other than a discharge for cause with insufficient credited ser-

vice to entitle him to a benefit under Article II of the Kelsey-Hayes, Heintz Division Hourly-Rate Employes and Salaried Employes within a Bargaining Unit Pension Plan, or . . . .

(R.6: Hess Aff't Ex. E at 2, 14, 86-89)

GUNITE COLLECTIVE BARGAINING AGREEMENT

The last CBA at Gunite, dated April 26, 1983, contained the following provisions:

21.7 *Retirees Cost of Insurance*—The Company will pay the full cost of hospital and medical expense coverages of currently enrolled pensioners and their eligible dependents and future pensioners provided the pensioner is eligible for benefits under Gunite Pension Plan, Exhibit "C". Coverage will be continued for the surviving spouse of insured retirees provided they are enrolled in Medicare Part B (if eligible).

* * *

ARTICLE XXV
DURATION

25.1 All prior agreements either oral or written are hereby cancelled and this Agreement and supplements attached hereto shall constitute the entire agreement between the parties. However, this Agreement may, by mutual agreement, be amended or modified from time to time in writing, and such amendments or modifications shall become a part of this Agreement when attached to this Agreement and signed by the respective parties.

* * *

25.3 This Agreement shall be in full force and effect April 23, 1983, except as provided herein, as of the date of ratification, February 6, 1983, and shall remain in effect until April 23, 1986 (11:59

p.m.), and shall continue thereafter in full force and effect from year to year unless written notice of termination of this Agreement, is given by either party to the other, in writing, by registered or certified mail, on or before sixty (60) days prior to the termination date.

(R.6: Hess Aff't Ex. A at 61, 67-68)

APPENDIX C

LANGUAGE IN SUMMARY PLAN DESCRIPTIONS

A summary plan description ("SPD") for the Gunite plant issued in 1984 (dated in 1983) provided:

For Retired Employes

When you are retired and are receiving benefits under the Pension Plan (except deferred vested benefits), your life insurance (at a reduced level shown on page 26) and all of your Health Care Coverages are continued without cost to you.

* * *

Termination of Employment

If you terminate employment with Kelsey-Hayes at age 65 or older for any reason other than discharge for cause, all of your Health Care coverages will be continued for the rest of your life without cost to you.

Kelsey-Hayes also pays the full cost of Health Care coverages for surviving spouses and eligible children of deceased pensioners and of employes who die after they are eligible to retire voluntarily under the Kelsey-Hayes Pension Plan.

A surviving spouse age 65 or older who is eligible but not enrolled for Medicare Part B coverage is not eligible for Kelsey-Hayes payment for any Health Care Coverages.

(R.6: Hess Aff't Ex. C at 43-44)

* * *

A SPD describing benefits provided Heintz hourly employees under the 1977 CBA and Insurance Supplement contained the following statements:

When you are retired, your life insurance and all of your Health Care coverages, except for vision, are continued without cost to you. In addition, survivor income benefit insurance is provided to age 65 for employes receiving total and permanent disability benefits under the Pension Plan. However, A.D.&D. insurance is not continued after you reach age 65 if retired under a total and permanent disability retirement.

If you terminate employment with Kelsey-Hayes at age 65 or older for any reason other than discharge for cause, all of your Health Care coverages, except vision care, will be continued for the rest of your life without cost to you.

Kelsey-Hayes also pays the full cost of Health Care coverages, except vision care, for surviving spouses and eligible children of deceased pensioners and of employes who die after they are eligible to retire voluntarily under the Kelsey-Hayes Pension Plan.

A surviving spouse age 65 or older who is not enrolled for Medicare Part B coverage is not eligible for Kelsey-Hayes payment for any Health Care coverages.

(R.6: Hess Aff't Ex. F at 40)

The SPECO SPD is similar to the 1984 Gunite SPD, including the restriction of the "rest of your life at no cost to you" language to persons who terminated employment at age 65 or after. (R. 21)